

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

**SUPERIOR COURT
CRIMINAL ACTION
NO. 2009-00167**

COMMONWEALTH

vs.

ROBERT UPTON

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S
MOTION FOR NEW TRIAL**

Robert Upton, the defendant, was convicted after a jury trial in January, 2013 of first degree murder, on the theories of deliberate premeditation and felony murder; aggravated assault and battery with a dangerous weapon; and armed assault in a dwelling. The Supreme Judicial Court stayed the direct appeal of the conviction pending the outcome of the defendant's two motions for new trial.¹ In the second motion now before the court, the defendant moves for a new trial on the grounds of newly discovered evidence arising out of the contradictory testimony of a key prosecution witness during a subsequent civil wrongful death action, and the purported existence of a secret agreement between that witness and the Commonwealth to reduce charges in exchange for testimony at the defendant's trial. The defendant also moves for an evidentiary hearing in support of his motion for new trial. After careful consideration of the record, exhibits, and memoranda, the defendant's motions for new trial and evidentiary hearing must be **DENIED** for the following reasons.

¹ This jurist denied the defendant's first motion for new trial on November 17, 2015. The instant motion followed, and is now before the court.

BACKGROUND

On September 30, 2009, Aris Manoloules was found dead in his Hyannis home, shot four times. The defendant, Robert Upton, was convicted of first degree murder after a jury trial in January, 2013, and sentenced to life in prison without parole.² The key prosecution witness at the defendant's trial was codefendant Christopher Manoloules.

As family relationships factored heavily in the events leading to Aris Manoloules' death, this jurist details them here. The defendant's sister is Christopher Manoloules' mother, Deborah Manoloules (née Upton), who is married to Christopher's father, Treefon Manoloules.³ The victim, Aris, was Treefon's brother and Christopher's uncle. As such, the victim was related to the defendant only by extended marital ties: he was the defendant's sister's brother-in-law.

The following evidence was presented by the Commonwealth at the defendant's trial. Christopher testified that his father, Treefon, hired Christopher's maternal uncle, the defendant, to kill Christopher's paternal uncle, the victim. Christopher testified that Treefon had been trying to hire someone to kill the victim for some time because Treefon believed that the victim's neglect of their mother resulted in her death and the victim's sole inheritance of her estate. Christopher testified that his mother, Deborah, had recently asked the defendant, her brother, to mentor Christopher regarding school attendance and sobriety. Instead, according to Christopher's testimony, his interactions with the defendant quickly turned towards planning various lucrative criminal schemes, because the defendant claimed that he needed money to save the life of his daughter, Hailey, Christopher's cousin. Christopher testified that the defendant

² The defendant was also convicted of assault and battery with a dangerous weapon with serious bodily injury, G. L. c. 265, § 15A(c)(1), and armed assault in a dwelling, G. L. c. 265, § 18A. The defendant was sentenced to 14-15 years in prison on the former and life in prison on the latter, to run concurrently with the first degree murder sentence.

³ Because Christopher Manoloules, Deborah Manoloules, Treefon Manoloules, and Aris Manoloules share the same last name, this jurist refers to all four by their first names.

stated that he owed \$150,000 to a man who was threatening to kill Hailey if he did not pay off the debt soon. Christopher testified that the defendant discussed his debt with Treefon, and Treefon suggested he would give the defendant the necessary money if he would kill the victim on Treefon's behalf. Christopher testified that Treefon promised to pay the defendant \$165,000 over five days after the murder, and gave the defendant cash to purchase a handgun shortly before the murder.

This testimony was corroborated by the testimony of Christopher's friend, Dylan Laird.⁴ Laird testified that he was present for conversations between the defendant and Christopher regarding a plan to rob a third party's house, and during conversations between Christopher, Treefon and the defendant regarding plans to murder the victim by overdose, shooting, or strangulation. Laird testified that he was asked by the trio to go along with the plan to murder the victim, but declined to participate.

The only testimony regarding the details of the shooting came from Christopher. He testified that, upon Treefon's direction, the defendant drove him to the victim's Hyannis home on the evening of September 29, 2009. Christopher testified that the defendant, carrying a handgun in his waist band and wearing unseasonably warm clothing and gloves, accompanied him into the victim's home. Christopher testified that the pair made pleasantries with the victim in the living room, and then Christopher went downstairs to search some bedrooms for jewelry while the defendant stayed upstairs in the kitchen. Christopher testified that after he returned to the kitchen and told the defendant there was no jewelry present and that they should just leave, the defendant pulled out his handgun, cocked the trigger, and walked into the adjacent living room.

⁴ Laird testified pursuant to an expressly disclosed grant of immunity by the Commonwealth. The jury was instructed on the immunity and their ability to consider it when determining credibility or concluding whether the witness received any benefit, promise or reward for his testimony.

Christopher testified that he heard the victim say "No, no, please," and then four shots.

Christopher testified that the defendant came out of the living room and stated "It's un[expletive] believable the amount of blood coming out of this guy's head." The pair left Hyannis and stopped at an unknown location to put their clothing and personal items into a dumpster before returning to Treefon's home.

The Commonwealth also presented the audiovisual recording of the defendant's October 1, 2009 interview with police. In the interview, the defendant first denied any knowledge of a crime or being on the Cape, but noted that he had bought a 9 mm Ruger handgun and 50 rounds of ammunition on the afternoon of September 29, 2009, and locked the items in the trunk of his car. As the interview progressed, the defendant stated that on September 30th, he noticed his gun missing and more miles than expected on his car and thought that Christopher or his friends might have driven his car. Eventually, the defendant admitted driving Christopher to a parking lot near the water on the Cape on the night of September 29th, and waiting while Christopher left for 20-30 minutes to "go meet someone." The defendant stated that Christopher returned in a tense state, and the defendant drove him back to Treefon's house. The defendant stated that he thought the gun was still locked in the trunk while the pair were on Cape, but he didn't check.

Along with Christopher's testimony and the defendant's interview statements, the Commonwealth presented evidence tying the defendant to the murder weapon. The Commonwealth presented evidence that the defendant had purchased a Ruger P85 handgun and a box of 9 mm ammunition between 3:30 and 3:50 p.m. on September 29, 2009. The defendant's girlfriend, Erin O'Malley, testified that she had seen him cleaning a handgun and ammunition in

her home on September 30, 2009, and told him to remove the weapon from her home.⁵

O'Malley testified that on October 5, 2009, she and her sister searched O'Malley's basement, where the sister found a hidden handgun in a lock box and a box of ammunition missing four bullets. These items were submitted as evidence, along with testimony that the recovered handgun's serial number matched the one sold to the defendant, and ballistics testing matched it to shell casings and projectiles found at the scene.

Lastly, the Commonwealth presented evidence from which the jury could infer the defendant's awareness of and financial motive to participate in the murder-for-hire plot immediately preceding the victim's death. This evidence was offered in the form of testimony regarding a \$77,000 Mercedes that the defendant purchased for O'Malley as a gift. A car salesman testified that when the Mercedes was delivered in late July, 2009, the defendant paid with a personal check, but told the salesman to hold the personal check because his funds were frozen and that a certified check or other payment would be forthcoming.⁶ The salesman testified that the car was taken back from O'Malley after a period of time because extensive communications with the defendant regarding valid payment failed to produce any result. The salesman testified that he subsequently received a text message from the defendant's number at approximately 8 o'clock on September 29, 2009,⁷ stating "My brother-in-law is getting the money for me, and I will know a lot more around 10:00 a.m. I didn't get back till 3:00 a.m. And Nerry (*sic*), I didn't reply. I will call you in a few hour (*sic*)."

⁵ By the time of her testimony, the witness had married and changed her name to Erin O'Malley Mandeville. At the time of the events in question, her name was Erin O'Malley. For the purposes of clarity, this jurist will refer to her as "O'Malley" throughout.

⁶ The salesman was a former coworker of the defendant's, and had a friendly relationship with him at the time of the events in question.

⁷ The evidence presented to the jury did not specify whether the text was received at 8:00 a.m. or 8:00 p.m.

DISCUSSION

"A defendant seeking a new trial on the ground of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction." *Commonwealth v. Grace*, 397 Mass. 303, 305 (1986). Evidence is newly discovered if it was "unavailable at the time of trial and could not have been discovered with reasonable diligence." *Commonwealth v. LeFave*, 430 Mass. 169, 176 (1999). Newly discovered evidence casts real doubt on the justice of conviction if "there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial." *Grace*, 397 Mass. at 306. "Questions of credibility are for the trial judge, even when the testimony is undisputed." *Commonwealth v. Little*, 384 Mass. 262, 269 (1981) (citations omitted). A judge is not required to credit assertions in sworn testimony submitted in support of a motion for a new trial, and "may evaluate them in light of factors pertinent to credibility, including bias, self-interest, and delay." *Commonwealth v. Torres*, 469 Mass. 398, 403 (2014).

In considering the new trial motion, the court may base its decision entirely on the motion and accompanying exhibits, unless it determines that a substantial question was raised by the submissions which requires an evidentiary hearing. Mass. R. Crim. P. 30(c)(3); *Commonwealth v. Stewart*, 383 Mass. 253, 259-260 (1981). "In determining whether a substantial issue meriting an evidentiary hearing under rule 30 has been raised, we look not only at the seriousness of the issue asserted, but also to the adequacy of the defendant's showing on the issue raised." *Stewart*, 383 Mass. at 257-258 (internal quotations omitted). "A defendant's submissions in support of a motion for a new trial need not prove the factual premise of that motion, but they must contain sufficient credible information to cast doubt on the issue. A judge may also consider whether holding a hearing will add anything to the information that has been

presented in the motion and affidavits." *Commonwealth v. Goodreau*, 442 Mass. 341, 348 (2004).

This jurist relies on his "knowledge of the trial and evaluation of the witnesses and evidence at the trial when reaching [this] decision on [the defendant's] motion for a new trial, including whether to decide the motion without an evidentiary hearing." *Torres*, 469 Mass. at 403. The exhibits associated with the defendant's motion do not offer sufficient credible information to cast doubt as to whether there was a secret cooperation agreement between Christopher and the Commonwealth, and thus no evidentiary hearing is required. See *Goodreau*, 442 Mass. at 348. Accordingly, this jurist's decision is based solely on the record and exhibits.

I. Newness of the Proffered Evidence

A defendant seeking a new trial has the burden to show that the evidence was unknown to the defendant or trial counsel and not reasonably discoverable at the time of trial. *Commonwealth v. Shuman*, 445 Mass. 268, 271 (2005). The defendant's motion for new trial is largely based on Christopher's recent testimony in a civil trial. There, Christopher testified that he had no present memory of certain events to which he previously testified in the defendant's trial, and, for the first time, claimed his prior trial testimony was motivated by a secret, unwritten agreement he had with the Commonwealth to reduce his charges. Along with the civil testimony, the defendant's instant motion relies upon Christopher's agreed-upon guilty plea to a reduced charge of manslaughter several months after the defendant's trial and certain statements by counsel during Christopher's plea hearing.⁸

⁸ The defendant raises two other claims without citation to any case law, which do not warrant significant discussion. First, the defendant claims that Christopher's plea of guilty to manslaughter is inconsistent with his trial testimony that he was trying to stop the victim's murder and had no intent to participate in a joint venture to rob or kill the victim. Even if the defendant's proposition is correct, this would merely constitute cumulative impeachment evidence, which is not ordinarily the basis of a new trial. *Grace*, 397 Mass. at 305-306. Second, the defendant claims that the civil jury's verdict, finding no liability for Treefon, "prove[s] that he had nothing to do with Aris' death" and "undercuts the Commonwealth's entire theory that this was a murder for hire at Treefon's behest" such

The outcome of the civil trial and plea hearing are certainly distinct events that occurred well after the defendant's trial, and thus were not discoverable through "reasonable pretrial diligence." *Commonwealth v. Pike*, 431 Mass. 212, 218 (2000). However, as discussed below, these pieces of evidence, without more, are insufficient to credibly allege that there was a secret cooperation agreement and cast real doubt on the defendant's conviction. As such, the defendant must also prove that Christopher's civil testimony was newly discovered to prevail on the motion.

Christopher testified at the trial, and was extensively cross-examined by trial counsel. He repeatedly denied that he had received any promises or held any belief that he would receive a benefit from the Commonwealth in exchange for his trial testimony.⁹ Christopher's civil testimony to the contrary does not transform this later testimony into newly discovered evidence unless the defendant can make a substantial showing that the agreement did actually exist at the time of trial and was deliberately concealed from trial counsel by Christopher and/or the prosecutor. Cf. *Commonwealth v. Green*, 92 Mass. App. Ct. 1102, *2 (2017) (unpub.), rev. denied 478 Mass. 1104 (2017) (witness' subsequent testimony to events differing from trial testimony does not constitute newly discovered evidence where witness was specifically cross-examined at trial regarding subject on which witness was later inconsistent).

that there is real doubt cast upon to the justice of the defendant's conviction. What a separate civil jury may have concluded, when presented with different evidence, is of no relevance to the validity of the defendant's conviction.

⁹ Trial counsel specifically inquired "Nobody has suggested . . . you're going to get anything favorable for coming here and testifying?" to which Christopher responded "No, no - no promises, nothing." Trial counsel further inquired "Now, let me ask that in another way. We talked about the idea that nobody said anything to you. Has there been anything that wasn't said, but is understood in your mind?" to which Christopher replied "No." Trial counsel continued to press the issue, noting Christopher's pending charge for first degree homicide and asking "If you find yourself in this room three or four months down the road . . . getting tried for first degree homicide, are you going to be surprised?" Christopher replied that he did not know, that it was possible, but he did not "know what's going to happen." Trial counsel later emphasized this exchange during closing arguments, telling the jury that they were "being asked to swallow a legal fiction on the question of whether or not Christopher . . . is getting anything for testifying", and that it was up to them to decide if Christopher had "an expectation in his head of what he is getting for coming up here and saying the 'right thing.'"

As such, the defendant cannot prevail unless he provides substantial, credible evidence of his most serious claim: that a deliberate *Brady* violation has occurred. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Commonwealth v. Hill*, 432 Mass. 704, 715-716 (2000) (prosecutor violated *Brady* by failing to disclose "loose agreement" with witness to dismiss or reduce pending charges); *Commonwealth v. Gilday*, 382 Mass. 166, 176-177 (1980) (prosecutor who makes arrangement with witness's attorney for favorable treatment has duty to disclose same under *Brady*). Because the *Brady* determination constitutes the crux of the analysis as to whether Christopher's changed testimony casts any real doubt on the justice of the defendant's conviction, a single finding settling both questions is set forth below.

II. Credibility of Alleged Brady Violation

When viewed in the context of prior proceedings before this jurist, the defendant's evidence of a secret agreement lacks credibility and does not raise a real issue meriting an evidentiary hearing. The allegation of a secret agreement was raised and extensively explored on the record during pre-trial proceedings. The defendant filed a motion in limine for its production accompanied by the affidavit of an attorney unrelated to the case. The unrelated attorney attested that during Treefon's trial, which preceded the defendant's trial, she had overheard an assistant district attorney discussing Christopher's testimony with a third party and telling the third party that Christopher was going to receive a reduction in his charges to second degree murder.

In response to the motion, this jurist inquired of the prosecutor as to the existence of any secret agreement. The prosecutor specifically denied, while on record before the court, the existence of any undisclosed promise, reward or inducement. The prosecutor stated that the only agreement in place had been previously disclosed in Treefon's trial and to the defendant's counsel. The prosecutor stated that this disclosed agreement was explicitly limited to not using

Christopher's testimony and statements to the State Police against him in future proceedings, except in the instance of perjury. This jurist's inquiry on the subject was not cursory or general: the defendant's concerns regarding any communication of an inducement through implication or oral assurance of reduced charges, and the putative validity of the statement that Christopher was "getting second," were directly queried and denied by the prosecutor.¹⁰ The prosecutor's specific, credible, and repeated denials satisfied this jurist that no secret agreement existed. The prosecutor's credibility is not diminished by Christopher's recent civil testimony asserting the contrary, and this jurist sees no reason to repeat what would be a nearly identical inquiry of the prosecutor in a separate evidentiary hearing on this motion.

Christopher's recent testimony occurred in the context of a civil wrongful death action brought by his aunt Irene Manoloules on behalf of the victim's estate.¹¹ The victim's estate, comprised largely of the disputed inheritance from his mother, was bequeathed to Irene and Treefon, in equal shares. In the civil action, Irene sought extensive damages on behalf of the victim from Christopher, Treefon, and the defendant. Thus, the outcome of the civil trial determined whether Christopher's father, and by extension his mother and sisters, would effectively lose his portion of the inheritance which is at the center of this sorry tale. In these circumstances, Christopher had a substantial motive to protect his family's financial interests by undermining the credibility of his own prior testimony that his father was the unrelenting force

¹⁰ This jurist inquired if "anybody said to [Christopher], Kid, you are getting second for this?" The prosecutor replied "No, not by the Commonwealth. Not by me." This jurist further questioned the prosecutor as to "the fact that an ADA according to Attorney McLaughlin seems to know this kid is getting a second out of this case." The prosecutor stated that "it's not [true]. But even if it was, that would have to be communicated to Christopher . . . And he was under oath on two separate occasions and indicated that's not the case." For final clarification, this jurist asked "Has that ['he'll get a second'] been communicated to [Christopher] or his lawyers?" The prosecutor replied with an unequivocal "Never."

¹¹ *Irene Manoloules v. Treefon Manoloules et al.*, 1281 CV 3875.

behind the murder plot. Indeed, he explicitly admitted in his civil trial testimony that he wanted to help his father and thought he "deserved to win."

Christopher's credibility is diminished by more than just his motive to lie—the content and manner of his statements further undercuts any suggestion of their veracity. His testimony regarding the alleged agreement to avoid a life sentence was suspiciously vague. He offers no detail as to when such agreement was communicated to him or his attorneys, which person at the District Attorney's Office made the communication, or what form the communication took. Moreover, he provides no explanation as to why he would have concealed this agreement until the civil trial, while repeatedly testifying that there was no such agreement before the grand jury and at the trials of Treefon and the defendant.

The final blow to the credibility of Christopher's civil testimony comes from the telling silence that follows it. The defendant has not provided any evidence that Christopher has reiterated his claim of a secret agreement since the conclusion of the civil proceedings, nor has he provided affidavits from Christopher's attorneys confirming its existence and providing details of the relevant communications which would permit the court to ferret out such an agreement. "Given [a witness'] two sworn statements that no plea agreement existed, the absence of countervailing affidavits from those in a position to know the truth regarding the existence of an agreement supports a determination of a lack of credibility." *Commonwealth v. Raymond*, 450 Mass. 729, 734 (2008) (letter of cooperating codefendant witness claiming secret plea agreement not credible or sufficient material evidence in absence of affidavits from witness and attorneys to warrant evidentiary hearing or require allowance of motion for new trial). Cf. *Hill*, 432 Mass. at 710-711 (existence of undisclosed agreement for consideration bolstered by affidavit of witness's counsel detailing content of pretrial communications with prosecutor).

In short, this jurist concludes that Christopher's civil testimony regarding an informal agreement was a convenient falsehood, a transparent device fleetingly employed to protect his family's financial interests and cast aside once Treefon was secure from civil liability. The remaining evidence submitted by the defendant in support of the claimed *Brady* violation is weak and circumstantial: Christopher's subsequent guilty plea to manslaughter, and certain statements of counsel during the plea hearing.

Without more, the fact of the Commonwealth's subsequent disposition of a witness's pending charges through a change of plea with a favorable agreed-upon sentence does not raise a defendant's claim of an undisclosed cooperation agreement beyond mere "surmise."

Commonwealth v. Schand, 420 Mass. 783, 792-793 (1995). See *Hill*, 432 Mass. at 708, 711-713.¹² The claim does not rise to firmer footing with the addition of counsel's statements during the plea hearing.

The defendant argues that the existence of the secret agreement is proven by the prosecutor's statement to the plea judge that "no discussions concerning a change of plea were ever *openly* discussed at all until after the completion of the trial of Robert Upton" (emphasis

¹² The defendant relies on *Hill* for the proposition that the Commonwealth's post-testimony reduction in charges for a witness is "strong[] support[for] the existence of an agreement." *Hill*, 432 Mass. at 712. In *Hill*, there was overwhelming evidence of the existence of an undisclosed cooperation agreement apart from the witness' reduced charges: the prosecutor testified at the witness' plea hearing that she told the witness "that the quid pro quo was 'if you cooperate we will take it into consideration'"; and the witness' counsel submitted an affidavit and testimony detailing specific conversations between himself and the prosecutor where she assured him the witness' charges would be dropped. *Id.* at 708, 711. Moreover, the *Hill* court's analysis with respect to the reduction in charges turns on facts which diverge from the case at bar. The *Hill* witness admitted to the elements of his pending charges during his testimony in the defendant's trial, and police had other, overwhelming evidence of his crime. *Id.* at 712. Here, Christopher did not admit to any of the elements of the pending first degree murder charge which he later avoided. Indeed, he extensively testified to his own lack of intent to kill the victim or steal anything from the home, as well as his attempt to dissuade the defendant from carrying out the murder shortly before it occurred and his prior acts to frustrate other attempts on the victim's life. Moreover, the Commonwealth could not use that testimony or his prior statements to police in a subsequent trial, by operation of the express agreement which was repeatedly disclosed by the trial prosecutor to defense counsel and this court. Without this, the Commonwealth had little more than circumstantial evidence and the defendant's statements to police that he drove Christopher to the victim's house and thought his gun might be missing. In short, despite the defendant's selective quotation of *Hill*, the broader analysis of that case sounds in support of the Commonwealth's position.

added). The term "openly" must be considered in the context of the prosecutor's immediately preceding statement that "there was never an offer made to Mr. Manoloules or his attorney during the pendency of either [Treefon's or the defendant's] cases." The juxtaposition of these two sentences demonstrates that the prosecutor's use of the term "openly" was not reference a secret agreement with Christopher or his counsel, but instead likely referred to any internal, confidential discussions amongst prosecution staff regarding an acceptable sentencing recommendation.

Next, the defendant argues that the statement of Christopher's plea counsel that the prosecutor was "a man of his word" refers to the prosecutor upholding his end of the alleged secret agreement. Again, plea counsel's comment cannot fairly be taken in isolation, and must be read in the context of his immediately preceding statements. The comment followed an extensive description of the prosecutor's "tak[ing] very seriously" several threats against Christopher and "instigat[ing]" "the transfer of [Christopher] to his present place of incarceration." Thus, it is likely that the "word" referenced by plea counsel was the prosecutor's statement that he would assist in securing Christopher's transfer to a safer facility. The defendant's interpretation defies reason, as it requires the conclusion that plea counsel was praising the prosecutor's honesty in sticking to a putative secret agreement just moments after hearing the prosecutor explicitly deny the existence of the agreement to the court.

Lastly, the defendant argues that plea counsel's later statement that Christopher "is getting some quid pro quo . . . for his cooperation with the Commonwealth" also references the existence of the alleged secret agreement. Once again, the context of the statement does not rationally support the defendant's interpretation. This phrase was uttered as part of a *request of the plea judge* to provide consideration by sentencing lower than the Commonwealth's

recommendation: "I ask for some consideration, more than what the State as (*sic*) enumerated for you, to show that he's—he's getting some quid pro quo . . ." No such judicial consideration would be required if, as the defendant suggests, the Commonwealth was bound by and adhered to a secret cooperation agreement.

Accordingly, this jurist finds that none of the evidence put forth by the defendant, whether newly discovered or previously available, credibly supports the defendant's claim that the prosecutor deliberately violated his duty under *Brady* by concealing a secret agreement to reduce Christopher's charges in exchange for his testimony, and failed to correct false trial testimony on that subject by Christopher.

III. Materiality of Impeachment Evidence

Although the defendant has failed to meet his burden as to newly discovered evidence of a secret cooperation agreement, Christopher's testimony in the civil trial still stands as impeachment evidence undermining the credibility of his testimony at the defendant's trial. Recantation of testimony by a witness "warrants 'serious consideration from the motion judge.'" *Commonwealth v. Jones*, 432 Mass. 623, 632 (2000), quoting *Commonwealth v. Watson*, 377 Mass. 814, 837-838 (1991). "While newly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial, a new trial may be warranted where . . . the Commonwealth's case depends on the testimony of a single witness and the newly discovered evidence contradicts that testimony." *Commonwealth v. Drayton*, 479 Mass. 479, 490 (2018) (internal citations and quotations omitted). This is not the case here.

First, the Commonwealth's case did not wholly depend on Christopher's testimony. Excluding Christopher's testimony completely, the Commonwealth still presented Laird's testimony that the defendant discussed a plot to kill the victim with Treefon and the defendant,

the defendant's statement to police admitting he drove to the location of the murder with Christopher, the forensic matching of the murder weapon to the handgun purchased by the defendant only hours before, O'Malley's testimony regarding the defendant's possession and concealment of the murder weapon after the victim's death, and the defendant's text message shortly before the murder to the car salesman stating that he was getting at least \$77,000 "from [his] brother-in-law" and would know more "at 10:00 a.m." In this jurist's estimation, this web of evidence was strongly persuasive to the jury.

Second, Christopher's civil testimony did not contradict his trial testimony on the subject of the defendant's involvement. To the contrary, Christopher's civil testimony specifically affirmed the defendant as the shooter, and did not claim any gaps in present memory as to the defendant's actions.¹³ Further, although Christopher repeatedly volunteered that he had no present memory of conversations with or actions by Treefon to which he had previously testified, he deftly and consistently refused to disavow any portion of his prior testimony at the trials of Treefon or the defendant, except on the subject of an alleged secret cooperation agreement.¹⁴ Thus, the only recantation in Christopher's testimony was on the subject of his motive to testify: he recanted his claim that he was trying to "do the right thing", and admitted he was trying "to avoid a life sentence."

¹³ During civil cross-examination, Treefon's counsel asked "So it was either you that pulled the trigger, or it was Robert Upton that pulled the trigger, correct?" Christopher responded "It was Robert Upton."

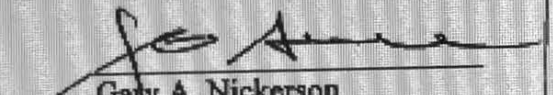
¹⁴ Treefon's counsel asked "You acknowledge that that was your testimony, correct?" Christopher stated "Yes. Yes." Counsel asked "But you do not acknowledge that that is the truth, do you?" Christopher responded "I'm not going to admit to perjury, but that's - is that what you're asking me to? Because no, that was the truth." Counsel asked "Are you saying that that was the truth back then?" Christopher answered "Yes." Counsel asked "Are you saying that your father was implicate - was involved in this murder?" Christopher responded "That's what it says." Counsel pressed "I understand what that says, but are you saying that to this jury right now?" and Christopher responded "Yes." Counsel parried "You are saying that?" and Christopher returned "That's what it says." Counsel tried once more, stating "Okay. So you're not moving from this?" and Christopher responded "No." Counsel clarified "Okay. But you don't remember some of your testimony, do you?" and Christopher agreed "I have a bad memory."

In this jurist's view, Christopher's demeanor at the defendant's trial, and his testimony casting himself as repeatedly trying to save his uncle and "do the right thing," had already raised significant questions in the jury's mind as to his motive to testify. The centerpiece of the defense theory was that Christopher was pinning the crime on the defendant to serve his own self-interest, and trial counsel repeatedly and effectively challenged Christopher's assertions that he was only an unwilling victim of his father and uncle's manipulation. This jurist also instructed the jury to weigh the motive of a witness to testify and to consider whether "a witness has or hasn't been promised anything, or whether that witness in the witness' mind expects some reward or something in return for their testimony." Thus, the addition of the civil testimony would be merely cumulative of ample impeachment evidence, and would not add much to the jury's consideration of his testimony in light of the other independent evidence of the defendant's guilt. *Commonwealth v. Toney*, 385 Mass. 575, 581 (1982).

In sum, this jurist concludes that the defendant has not provided sufficient, credible and material evidence to cast any real doubt on the justice of his conviction, or require an evidentiary hearing to further explore his claims. *Commonwealth v. LaFaille*, 430 Mass. 44, 55 (1999). Accordingly, the defendant's motion for new trial must be **DENIED**.

ORDER

For the foregoing reasons, it is **ORDERED** that the defendant's Motion for New Trial be **DENIED** without hearing.


Gary A. Nickerson
Justice of the Superior Court

DATED: July 27/2018

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